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FIRST GENERAL COUNSEL'S REPORT

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DATE OF NOTIFICATION: 3/14/12

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ELECTION CYCLE: 2010

EXPIRATION OF SOL: 9/9/2015

COMPLAINANTS:

Citizens for Responsibility and Ethics in
Washington

Melanie Sloan

RESPONDENT:

Americans for Job Security and Stephen DeMaura,
individually and in his capacity as president and
treasurer of Americans for Job Security

**RELEVANT STATUTES
AND REGULATIONS:**

2 U.S.C. § 431(4)

2 U.S.C. § 432

2 U.S.C. § 433

2 U.S.C. § 434

26 U.S.C. § 501(c)

11 C.F.R. § 100.22

INTERNAL REPORTS CHECKED:

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FEDERAL AGENCIES CHECKED:

None

14044706-1705

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I. INTRODUCTION

This matter involves allegations that Americans for Job Security ("AJS") violated the Federal Election Campaign Act of 1971, as amended, ("the Act") by failing to organize, register, and report as a political committee after spending over nine million dollars on independent expenditures and electioneering communications during 2010. *See* Compl. at 3, 12.¹

AJS acknowledges exceeding the Act's \$1,000 threshold for expenditures or contributions triggering political committee status. 2 U.S.C. § 431(4); Resp. at 5. AJS argues, however, that it is not a political committee because it lacks the requisite major purpose: the nomination or election of a federal candidate. *Id.* at 1, 2, 5, 11. AJS's argument rests on the assertion that it spent greater sums on activity not considered express advocacy than it did on independent expenditures. *Id.* at 5, 11-12. In our view, the argument is wide of the mark.

As discussed below, AJS's overall conduct supports a finding that there is reason to believe that AJS had as its major purpose the nomination or election of federal candidates during 2010. Accordingly, we recommend that the Commission find reason to believe that AJS violated 2 U.S.C. §§ 432, 433, and 434, by failing to organize, register, and report as a political committee, and authorize an investigation.

II. FACTUAL AND LEGAL ANALYSIS

A. Facts

1. AJS

Americans for Job Security, a tax-exempt entity organized under section 501(c)(6) of the Internal Revenue Code, was founded in 1997. Compl. at 3; Resp. at 2-3. Stephen DeMaura is the President and Treasurer. Compl. at 3. AJS describes itself as an "independent, bi-partisan,

¹ The Complaint also names Stephen DeMaura, individually, as a respondent but does not include any allegations that he violated the Act. Compl. at 10-12. DeMaura did not file a separate response.

1 pro-business issue advocacy organization” whose chief goal is “educating the public on issues of
2 importance to businesses and encouraging a strong job-creating economy that promotes a pro-
3 growth agenda.” Resp. at 3; see <http://www.savejobs.org/aboutajs.php>. Its articles of
4 incorporation state that it is incorporated for the purpose of uniting “in a common organization
5 businesses, business leaders, entrepreneurs, and associations of businesses” and to “promote the
6 common business interests of its members . . . by helping the American public to better
7 understand public policy issues of interest to business.” Resp. at 11. According to its tax return,
8 “the organization promotes governmental policy that reflects economic issues of the workplace”
9 by “educating the public through television, radio, and newspaper and direct mail
10 advertising . . .” Form 990, Return of Organization Exempt from Income Tax (2009) at 2.

11 2. AJS’s Activities
12

13 AJS states that since its establishment in 1997, it has received approximately \$54 million
14 in membership dues and assessments and has spent approximately \$51 million on its activities
15 and communications. Resp., Attach. 1. ¶ 3. AJS states that it did not air any electioneering
16 communications until 2008 or independent expenditures until 2010. *Id.* at 5. AJS cites several
17 examples of its “economic issue advocacy communications and activities” from 2004 through
18 2006, including communications about the “death tax” and the establishment of an asbestos trust
19 fund.² *Id.* at 3-4.

20 According to its tax return, AJS received \$12,411,684 and spent \$12,417,809 between
21 November 1, 2009, and October 31, 2010. Form 990, Return of Organization Exempt from
22 Income Tax (2009) at 1. During calendar year 2010, AJS made \$4,908,847.27 in independent

² AJS’s activities between 2000 and 2006 were the subject of MURs 5910 and 5694. The Commission split 3-3 on the question of whether AJS was a political committee, as well as on whether the advertisements discussed in the General Counsel’s Report were express advocacy.

1 expenditures. October 2010 Quarterly Report at 1, *available at*
2 <http://query.nictusa.com/pdf/560/10991369560/10991369560.pdf#navpanes=0>; 2010 Year End
3 Report at 1, *available at*
4 <http://query.nictusa.com/pdf/422/11930290422/11930290422.pdf#navpanes=0>. AJS also
5 reported spending \$4,598,518 during 2010 on electioneering communications. *See infra* notes
6 16-25.

7 The organization describes its issue advocacy campaigns as “particularly active during
8 campaign season” because “campaign season is when the majority of Americans are debating
9 and focused on public policy.” <http://www.savejobs.org/aboutajs.php> (“In addition, since the
10 media and public officials only focus on media markets where there are hotly contested political
11 campaigns, we select the media markets we advertise in accordingly.”). AJS lists several “issues
12 of the day” that it attempts to influence: reducing taxes; tort reform; free markets and free trade;
13 transportation; education reform; health care reform and modernization; and energy.
14 <http://www.savejobs.org/issues.php>.

15 B. Analysis

16 1. The Test for Political Committee Status

17
18 The Act and Commission regulations define a “political committee” as “any committee,
19 club, association or other group of persons which receives contributions aggregating in excess of
20 \$1,000 during a calendar year or which makes expenditures aggregating in excess of \$1,000
21 during a calendar year.” 2 U.S.C. § 431(4)(A); 11 C.F.R. § 100.5. In *Buckley v. Valeo*, 424 U.S.
22 1 (1976), the Supreme Court held that defining political committee status “only in terms of the
23 annual amount of ‘contributions’ and ‘expenditures’” might be overbroad, reaching “groups
24 engaged purely in issue discussion.” *Id.* at 79. To cure that infirmity, the Court concluded that

1 the term “political committee” “need only encompass organizations that are under the control of
2 a candidate or the *major purpose of which is the nomination or election of a candidate.*” *Id.*
3 (emphasis added). Accordingly, under the statute as thus construed, an organization that is not
4 controlled by a candidate must register as a political committee only if (1) it crosses the \$1,000
5 threshold and (2) it has as its “major purpose” the nomination or election of federal candidates.

6 a. The Commission’s Case-By-Case Approach to Major Purpose

7 Although *Buckley* established the major purpose test, it provided no guidance as to the
8 proper approach to determine an organization’s major purpose. *See, e.g., Real Truth About*
9 *Abortion, Inc. v. FEC*, 681 F.3d 544, 556 (4th Cir. 2012), *cert. denied*, 81 U.S.L.W. 3127 (U.S.
10 Jan. 7, 2013) (No. 12-311) (“*RTAA*”). The Supreme Court’s discussion of major purpose in a
11 subsequent opinion, *Massachusetts Citizens for Life v. FEC*, 479 U.S. 238 (1986) (“*MCFL*”),
12 was similarly sparse. *See id.* at 262. In that case, the Court identified an organization’s
13 independent spending as a relevant factor in determining an organization’s major purpose, but
14 examined the entire record as part of its analysis and did not chart the outer bounds of the test.
15 479 U.S. at 238. Following *Buckley* and *MCFL*, lower courts have refined the major purpose test
16 but only to a limited extent.³ In large measure, the contours of political committee status — and
17 the major purpose test — have been left to the Commission.⁴

³ *See FEC v. Machinists Non-Partisan Political League*, 655 F.2d 380, 396 (D.C. Cir. 1981) (stating that political committee “contribution limitations did not apply to . . . groups whose activities did not support an existing ‘candidate’” and finding Commission’s subpoena was overly intrusive where directed toward “draft” group lacking a “candidate” to support); *FEC v. GOPAC, Inc.*, 917 F. Supp. 851, 861-62 (D.D.C. 1996) (holding that a group’s support of a “farm team” of future potential federal candidates at the state and local level did not make it a political committee under the Act); *see also Unity08 v. FEC*, 596 F.3d 861, 869 (D.C. Cir. 2010) (concluding that an organization “is not subject to regulation as a political committee unless and until it selects a ‘clearly identified’ candidate”).

⁴ Like other administrative agencies, the Commission has the inherent authority to interpret its statute through a case-by-case approach. *See SEC v. Chenery Corp.*, 332 U.S. 194, 202-03 (1947) (“[T]he choice made between proceeding by general rule or by individual . . . litigation is one that lies primarily in the informed discretion of the administrative agency.”).

1 Following *Buckley*, the Commission adopted a policy of determining on a case-by-case
2 basis whether an organization is a political committee, including whether its major purpose is the
3 nomination or election of federal candidates. Political Committee Status, 72 Fed. Reg. 5,596
4 (Feb. 7, 2007) (Supplemental Explanation and Justification). The Commission has periodically
5 considered proposed rulemakings that would have determined major purpose by reference to a
6 bright-line rule — such as proportional (*i.e.*, 50%) or aggregate threshold amounts spent by an
7 organization on federal campaign activity. But the Commission consistently has declined to
8 adopt such bright-line rules. *See* Independent Expenditures; Corporate and Labor Organization
9 Expenditures, 57 Fed. Reg. 33,548, 33,558-59 (July 29, 1992) (Notice of Proposed Rulemaking);
10 Definition of Political Committee, 66 Fed. Reg. 13,681, 13,685-86 (Mar. 7, 2001) (Advance
11 Notice of Proposed Rulemaking); *see also* Summary of Comments and Possible Options on the
12 Advance Notice of Proposed Rulemaking on the Definition of “Political Committee,”
13 Certification (Sept. 27, 2001) (voting 6-0 to hold proposed rulemaking in abeyance).

14 In 2004, for example, the Commission issued a notice of proposed rulemaking asking
15 whether the agency should adopt a regulatory definition of “political committee.” *See* Political
16 Committee Status, 69 Fed. Reg. 11,736, 11,745-49 (Mar. 11, 2004) (Notice of Proposed
17 Rulemaking). The Commission declined to adopt a bright-line rule, noting that it had been
18 applying the major purpose test “for many years without additional regulatory definitions,” and
19 concluded that “it will continue to do so in the future.” *See* Final Rules on Political Committee
20 Status, Definition of Contribution, and Allocation for Separate Segregated Funds and
21 Nonconnected Committees, 69 Fed. Reg. 68,056, 68,064-65 (Nov. 23, 2004).

b. Challenges to the Commission's Major Purpose Test and the Supplemental E&J

When the Commission's 2004 decision not to adopt a regulatory definition was challenged in litigation, the court rejected plaintiffs' request that the Commission initiate a new rulemaking. *Shays v. FEC*, 424 F. Supp. 2d 100, 117 (D.D.C. 2006) ("*Shays I*"). The district court found, however, that the Commission had "failed to present a reasoned explanation for its decision" to engage in case-by-case decision-making, rather than rulemaking, and remanded the case to the Commission to explain its decision. *Id.* at 116-17.

Responding to the remand, the Commission issued a Supplemental Explanation and Justification for its final rules on political committee status to further explain its case-by-case approach and provide the public with additional guidance as to its process for determining political committee status. Political Committee Status, 72 Fed. Reg. 5595 (Feb. 7, 2007) ("Supplemental E&J"). The Supplemental E&J explained that "the major purpose doctrine requires fact-intensive analysis of a group's campaign activities compared to its activities unrelated to campaigns." *Id.* at 5601-02. The Commission concluded that the determination of an organization's major purpose "requires the flexibility of a case-by-case analysis of an organization's conduct that is incompatible with a one-size fits-all rule," and that "any list of factors developed by the Commission would not likely be exhaustive in any event, as evidenced by the multitude of fact patterns at issue in the Commission's enforcement actions considering the political committee status of various entities." *Id.*

To determine an entity's "major purpose," the Commission explained that it considers a group's "overall conduct," including public statements about its mission, organizational documents, government filings (*e.g.*, IRS notices), the proportion of spending related to "federal campaign activity," and the extent to which fundraising solicitations indicate funds raised will be

1 used to support or oppose specific candidates. *Id.* at 5597, 5605. Among other things, the
2 Commission informed the public that it compares how much of an organization's spending is for
3 "federal campaign activity" relative to "activities that [a]re not campaign related." *Id.* at 5601,
4 5605 (emphasis added).

5 To provide the public with additional guidance, the Supplemental E&J referenced
6 enforcement actions on the public record, as well as advisory opinions and filings in civil
7 enforcement cases following the 2004 rulemaking. *Id.* at 5,604-05. The Commission noted that
8 the settlements in several MURs involving section 527 organizations "provide considerable
9 guidance to all organizations" regarding the application of the major purpose test and "reduce
10 any claim of uncertainty because concrete factual examples of the Committee's political
11 committee analysis are now part of the public record." *Id.* at 5,595, 5,604.

12 After the Commission issued the Supplemental E&J, the *Shays I* plaintiffs again
13 challenged, under the Administrative Procedure Act, 5 U.S.C. §§ 551-59, the Commission's
14 case-by-case approach to political committee status. The court rejected the challenge, upholding
15 the Commission's case-by-case approach as an appropriate exercise of the agency's discretion.
16 *Shays v. FEC*, 511 F. Supp. 2d 19, 24 (D.D.C. 2007) ("*Shays II*"). The court recognized that "an
17 organization . . . may engage in many non-electoral activities so that determining its major
18 purpose requires a very close examination of various activities and statements." *Id.* at 31.

19 Recently, the Fourth Circuit rejected a constitutional challenge to the Commission's case-
20 by-case determination of major purpose. The court upheld the Commission's approach, finding
21 that *Buckley* "did not mandate a particular methodology for determining an organization's major
22 purpose," and so the Commission was free to make that determination "either through
23 categorical rules or through individualized adjudications." *RTAA*, 681 F.3d at 556. The court

1 concluded that the Commission's case-by-case approach was "sensible, . . . consistent with
2 Supreme Court precedent and does not unlawfully deter protected speech." *Id.* at 558.⁵ The
3 Fourth Circuit concluded that the Supplemental E&J provides "ample guidance as to the criteria
4 the Commission might consider" in determining an organization's political committee status and
5 therefore is not unconstitutionally vague. *Id.*; see Transcript of Telephonic Oral Ruling, *Free*
6 *Speech v. FEC*, No. 12-CV-127-SWS, at 21-22 (D. Wy. Oct. 3, 2012) (citing *RTAA* and finding
7 Commission's method of determining political committee status to be constitutional), *appeal*
8 *docketed*, No. 12-8078 (10th Cir. Oct. 19, 2012).⁶

9 c. Organizational and Reporting Requirements for Political
10 Committees
11

12 Political committees — commonly known as "PACs" — must comply with certain
13 organizational and reporting requirements set forth in the Act. PACs must register with the

⁵ The *RTAA* court rejected an argument — similar to the one made by AJS here — that the major purpose test must be confined to "(1) examining an organization's expenditures to see if campaign-related speech amounts to 50% of all expenditures; or (2) reviewing 'the organization's central purpose revealed by its organic documents.'" *RTAA*, 681 F.3d at 555. The Fourth Circuit recognized that determining an organization's major purpose "is inherently a comparative task, and in most instances it will require weighing some of the group's activities against others." *Id.* at 556; see also *Koerber v. FEC*, 483 F. Supp. 2d 740 (E.D.N.C. 2008) (denying preliminary relief in challenge to Commission's approach to determining political committee status, and noting that "an organization's 'major purpose' is inherently comparative and necessarily requires an understanding of an organization's overall activities, as opposed to its stated purpose"); *FEC v. Mälenick*, 310 F. Supp. 2d 230, 234-37 (D.D.C. 2004) (considering organization's statements in brochures and "fax alerts" sent to potential and actual contributors, as well as its spending influencing federal elections); *FEC v. GOPAC, Inc.*, 917 F. Supp. 851, 859 (D.D.C. 1996) ("The organization's purpose may be evidenced by its public statements of its purpose or by other means, such as its expenditures in cash or in kind to or for the benefit of a particular candidate or candidates."); *id.* at 864, 866 (applying a fact-intensive inquiry, including review of organizations' meetings attended by national leaders and organization's "Political Strategy Campaign Plan and Budget," and concluding that organization did not have as its major purpose the election of federal candidates).

⁶ The Supreme Court's decision in *FCC v. Fox Television Stations, Inc.* is not to the contrary. See 132 S. Ct. 2307, 2317 (2012) ("[A] regulation is not vague because it may at times be difficult to prove an incriminating fact but rather because it is unclear as to what fact must be proved"). In that case, the FCC's indecency standard was held to be vague for lack of notice when it applied a new stricter standard, *ex post facto*, to the Fox defendants, and when it relied on a single "isolated and ambiguous statement" from a 50-year old administrative decision to support its finding of indecency against the ABC defendants. *Id.* at 2319. Here, in sharp contrast, the Supplemental E&J — which was issued several years before the conduct at issue — provides extensive guidance on the Commission's approach to major purpose and has withstood both APA and constitutional challenges. See also *Center for Individual Freedom v. Madigan*, 697 F.3d 464 (7th Cir. 2012) ("*Madigan*") (rejecting vagueness challenge to the definition of "political committee" in the Illinois campaign finance statute).

1 Commission, file periodic reports for disclosure to the public, appoint a treasurer who maintains
2 its records, and identify themselves through “disclaimers” on all of their political advertising, on
3 their websites, and in mass e-mails. *See* 2 U.S.C. §§ 432-34; 11 C.F.R. §110.11(a)(1).⁷ The
4 Act’s reporting requirements “are minimal” and the organizational requirements are not “much
5 of an additional burden.” *SpeechNow.org v. FEC*, F.3d 686, 696 (D.C. Cir. 2010)
6 (“*SpeechNow*”). These requirements, which promote disclosure, do not, of course, prohibit
7 speech. *RTAA*, 681 F.3d at 552 n.3.

8 In the wake of the Supreme Court’s decision in *Citizens United v. FEC*, 130 S. Ct. 876
9 (2010), which struck down the Act’s prohibitions on corporate independent expenditures and
10 electioneering communications, the D.C. Circuit held in *SpeechNow* that political committees
11 that engage only in independent expenditures are not subject to contribution limits. *See* 599 F.3d
12 at 696. These political committees, often referred to as independent expenditure-only political
13 committees or Super PACs, continue to be subject, however, to the “minimal” “reporting
14 requirements of 2 U.S.C. §§ 432, 433, and 434(a), and the organizational requirements of
15 2 U.S.C. §§ 431(4) and 431(8).” *Id.* at 689.

16 Notably, the Supreme Court has stressed that such requirements serve the vital role of
17 disclosure in political discourse. *See Citizens United*, 130 S. Ct. at 916 (recognizing that
18 increased “transparency” resulting from FECA disclosure requirements “enables the electorate to
19 make informed decisions and give proper weight to different speakers and messages”); *Doe v.*
20 *Reed*, 561 U.S. ___, 130 S. Ct. 2811, 2820 (2010) (holding that public disclosure of state
21 referendum petitions serves important government interest of “promot[ing] transparency and
22 accountability in the electoral process,” and “preserving the integrity of the electoral process”);

⁷ An organization must register as a political committee when it crosses the \$1,000 threshold and determines, based on the guidance in the Supplemental E&J, that it has the requisite major purpose.

1 *Madigan*, 697 F.3d at 490 (upholding Illinois's campaign finance disclosure provisions against
2 constitutional facial challenge, finding a substantial relation to "Illinois's interest in informing its
3 electorate about who is speaking before an election"); *see also Doe*, 130 S. Ct. at 2837 (Scalia,
4 J., concurring) ("Requiring people to stand up in public for their political acts fosters civic
5 courage, without which democracy is doomed.").⁸

6 2. Application of the Test for Political Committee Status to AJS

7 a. Statutory Threshold

8
9 To assess whether an organization has made an "expenditure," the Commission "analyzes
10 whether expenditures for any of an organization's communications made independently of a
11 candidate constitute express advocacy either under 11 C.F.R. § 100.22(a), or the broader
12 definition at 11 C.F.R. § 100.22(b)." Supplemental E&J at 5606. During calendar year 2010,
13 AJS made more than \$4.9 million in independent expenditures. *See supra* at 4-5. Thus, AJS far
14 exceeded the \$1,000 statutory threshold for political committee status. *See* 2 U.S.C.
15 § 431(4)(A); 11 C.F.R. § 100.5.

16 b. Major Purpose

17
18 AJS states in its response, on its website, and in its tax returns that its major purpose is
19 not engaging in federal campaign activity but rather advocating issues and educating the public.
20 Resp. at 1, 11; <http://www.savejobs.org/aboutajs.php>; Form 990, Return of Organization Exempt
21 from Income Tax (2009) at 1, 2. The Commission noted in the Supplemental E&J that it may
22 consider such statements in its analysis of an organization's major purpose, Supplemental E&J at
23 5606, but that such statements are not necessarily dispositive. *See Real Truth About Obama v.*

⁸ *But cf. Minn. Citizens for Life, Inc. v. Swanson*, 692 F.3d 864, 876 (8th Cir. 2012) (striking down certain registration and disclosure provisions of Minnesota's campaign finance law, finding that those obligations as applied to associations that do *not* meet Buckley's "major purpose test" are unduly burdensome and do not match any "sufficiently important disclosure interest").

1 *FEC*, No. 3:08-cv-00483, 2008 WL 4416282, at *14 (E.D. Va. Sept. 24, 2008) (“A declaration
2 by the organization that they are *not* [organized] for an electioneering purpose is not
3 dispositive.”) (emphasis in original, alteration added), *aff’d*, 575 F.3d 342 (4th Cir. 2009),
4 *vacated on other grounds*, 130 S. Ct. 2371 (2010), *remanded and decided*, 796 F. Supp. 2d 736,
5 *affirmed sub nom. Real Truth About Abortion v. FEC*, 681 F.3d 544 (4th Cir. 2012), *cert. denied*,
6 81 U.S.L.W. 3127 (U.S. Jan. 7, 2013) (No. 12-311). Under the Commission’s case-by-case
7 approach, the Commission considers the organization’s “overall conduct,” including its
8 disbursements, activities, and statements. Supplemental E&J at 5597. In this case, AJS’s
9 proportion of spending related to federal campaign activity is alone sufficient to establish that its
10 major purpose in 2010 was the nomination or election of federal candidates.

11 AJS reported spending approximately \$4,908,847.27 on independent expenditures in
12 2010. *See supra* at 4-5. In addition, AJS spent \$4,598,520 during 2010 on electioneering
13 communications, all of which appear to be communications that criticize or oppose a clearly
14 identified Federal candidate but do not contain express advocacy. In past enforcement actions,
15 the Commission has determined that funds spent on communications that support or oppose a
16 clearly identified federal candidate but do not contain express advocacy should be considered in
17 determining whether that group has federal campaign activity as its major purpose.⁹

⁹ See Conciliation Agreement ¶ IV.11, MUR 5754 (MoveOn.org Voter Fund) (relying on funds used for advertisements that “opposed” or “criticized” George W. Bush to establish political committee status); Factual and Legal Analysis at 2, MUR 5753 (League of Conservation Voters 527) (finding major purpose satisfied where funds spent on door-to-door and phone bank express advocacy campaign, and also on advertisements “supporting or opposing clearly identified federal candidates, some of which contained express advocacy”); Conciliation Agreement ¶ IV.14, MUR 5487 (Progress for America Voter Fund) (concluding that PFA VF had met the major purpose test after spending 60% of its funds on communications that “praised George W. Bush’s leadership as President and/or criticized Senator Kerry’s ability to provide similar leadership”); *see also* Stipulation for Entry of Consent Judgment ¶ 22, *FEC v. Citizens Club for Growth, Inc.*, Civ. No. 1:05-01851 (Sept. 6, 2007) (entering stipulation of Commission, approved as part of a consent judgment, where organization was treated as a political committee because “the vast majority of [the group’s disbursements] were made in connection with federal elections, including, but not limited to, funding for candidate research, polling, and advertisements and other public communications referencing a clearly identified federal candidate”).

For example, the Commission has relied, in part, on the following advertisements in determining that an entity was a political committee:

- **"Child's Pay"**: The advertisement contains "images of children performing labor-intensive jobs: washing dishes in a restaurant kitchen, vacuuming a hotel hallway, working on an assembly line in a factory, collecting garbage, working at an auto repair shop, and checking groceries," and concludes with the question: "Guess who's going to pay off President Bush's \$1 trillion deficit?"¹⁰
- **"70 Billion More"**: The advertisement shows images of a young boy sitting at a school desk and a young girl with a thermometer in her mouth. The voice-over states: "We could build thousands of new schools, or hire a million new teachers. We could make sure every child has insurance. Instead, George Bush has spent \$150 billion in Iraq and has a secret plan to ask for \$70 billion more. But after four years it's now clear: George Bush has no plan for taking care of America. Face it. George Bush is not on our side."¹¹
- **"Jobs"**: "Is George Bush listening to us? Since taking office, he's let oil and energy companies call the shots. Special exemptions from the Clean Water and Clean Air Acts. Halliburton collecting billions in no-bid contracts. Here in Wisconsin, 52,500 manufacturing jobs lost. America is going in the wrong direction. And George Bush just listens to the special interests."¹²
- **"Yucca You Decide"**: "Yucca Mountain. While everyone plays politics, who's looking out for Nevada? Eighty-five percent of the nuclear waste could come through Las Vegas. Past businesses. Through communities. By our schools. Accidents happen, and if so, how could Las Vegas, a city and economy built on tourism, recover? Who would come visit us then? The question: did George W. Bush really try and stop Yucca Mountain? Or was he just playing politics?"¹³
- **"Finish It"**: [On screen: Images of Mohammed Atta, Osama bin Laden, Khalid Sheik Mohammed, Nick Berg's killers, and victims of terrorist attacks.] "These people want to kill us. They killed hundreds of innocent children in Russia. Two hundred innocent commuters in Spain. And 3,000 innocent Americans. John Kerry has a 30-year record of supporting cuts in defense and intelligence and

¹⁰ Factual and Legal Analysis at 3-4, 12-13, MUR 5754 (MoveOn.Org Voter Fund). The full communication can be viewed at <http://www.youtube.com/watch?v=A9WKimKlyUQ>.

¹¹ *Id.* at 4, 12-13. The full communication can be viewed at <http://archive.org/details/movf70billionmore>.

¹² Factual and Legal Analysis at 5, 18, MUR 5753 (League of Conservation Voters 527). The full communication can be viewed at http://archive.org/details/lcv_jobs_102604.

¹³ *Id.* at 5, 18. The full communication can be viewed at http://archive.org/details/lcv_yucca_decide.

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1 endlessly changed positions on Iraq. Would you trust Kerry against these fanatic
2 killers? President Bush didn't start this war, but he will finish it."¹⁴

3
4 • **"Ashley's Story":** This advertisement recounts the story of Ashley Faulkner,
5 whose mother was killed in the September 11, 2001, terrorist attacks, and the
6 interaction she had with President George W. Bush during a visit to Ohio. It
7 closes with Ashley Faulkner's father stating: "What I saw was what I want to see
8 in the heart and in the soul of the man who sits in the highest elected office in our
9 country."¹⁵

10
11 The Commission found that each of these advertisements — though not express advocacy
12 — demonstrated that the respondents had as their major purpose the nomination or election of
13 federal candidates. These ads evidenced that the organization's major purpose was federal
14 campaign activity because they "support," "oppose," "praise," or "criticize" the federal
15 candidates. *See supra* n.9-15.

16 Likewise, the following electioneering communications on which AJS spent
17 approximately \$4,598,518, though not express advocacy, support or oppose federal candidates
18 and therefore provide evidence that AJS had as its major purpose the nomination or election of
19 federal candidates:

20 i. Agree¹⁶

21
22 Behind closed doors, Washington decides the future of our health care. With no
23 transparency or accountability, they're slashing Medicare and raising taxes, and
24 only listening to the special interests. One Massachusetts leader says, "Slow
25 down. Get health care right." Scott Brown says, "Protect Medicare. Don't raise
26 taxes. Listen to the people, not the lobbyists." Call Scott Brown and tell him you
27 agree. Washington should listen to us on health care for a change.
28

¹⁴ Conciliation Agreement ¶ IV.14; MUR 5487 (Progress for America Voter Fund). The full communication can be viewed at <http://www.livingroomcandidate.org/commercials/2004/finish-it>.

¹⁵ *Id.* The full communication can be viewed at <http://www.livingroomcandidate.org/commercials/2004/ashleys-story..>

¹⁶ AJS spent \$479,268 on this advertisement.
<http://images.nictusa.com/pdf/308/10930863308/10930863308.pdf>.

ii. Thank You¹⁷

[Traditional Indian music is playing. There is a person of apparent southeast Asian descent, dressed in traditional garb and standing in front of stock footage of an Indian market.]

Person: "Thank you, Bill Halter. Thank you!"

[Screen shows an image of Bill Halter and the text: "Bill Halter off-shored American jobs to Bangalore, India while our economy struggled."]

Narrator: "While millionaire Bill Halter was a highly-paid director of a U.S. company, they exported American jobs to Bangalore, India."

[Person #2, also of apparent southeast Asian descent, appears in front of stock footage of an Indian family.]

Person #2: "Bangalore needs many, many jobs. Thank you, Bill Halter."

[Screen shows an image of Bill Halter and the text: "Support job creation here. Don't send jobs overseas."]

Narrator: "With almost 65,000 Arkansans out of work, we need jobs, too."

[Person #3, also of apparent southeast Asian descent, appears in front of stock footage of a street in India.]

Person #3: "Thank you. Thank you, Bill Halter."

[Screen shows an image of Bill Halter and the text: "While American families struggle, Bangalore says, 'Thanks Bill Halter.'"]

Narrator: "Bangalore says, 'Thanks, Bill Halter.' Arkansas, tell Bill Halter, 'Thanks for nothing.'"

iii. Outsource¹⁸

Arkansas families are struggling. Thousands out of work. Politicians? They say one thing and do another. Bill Halter says he has never outsourced American jobs. [Picture of Halter and text: "Not a single one of those companies has moved jobs overseas."] But the facts say when he was a highly-paid corporate director, his company outsourced jobs to India. Those jobs could have boosted a community here in Arkansas, but all they boosted was Bill Halter's company's bottom line. Call Bill Halter. Tell him to support job creation here in America.

¹⁷ AJS spent \$913,096 on this advertisement.
<http://images.nictusa.com/pdf/386/10030321386/10030321386.pdf>.

¹⁸ AJS spent \$490,000 on this advertisement.
<http://images.nictusa.com/pdf/250/10930863250/10930863250.pdf>.

iv. Back to Work¹⁹

Washington is a cesspool filled with political insiders who think more government is the solution. Not Ken Buck. Ken Buck stands up to the insiders in both parties. Ken Buck's conservative plan to get Colorado back to work: No to bailouts. No to debt. No to big government spending. Yes to low taxes for job creation that helps families. Call Ken Buck. Tell him to keep fighting for smaller government and policies that support taxpayers.

v. Brink²⁰

Our country is at the brink. Colorado families and workers need relief. Yet Jane Norton supported the largest tax hike in Colorado history, costing us billions. And Jane Norton's record on government spending? The state bureaucracy she managed grew by \$43 million in just three years. Record taxes and reckless spending has cost Colorado jobs. Call Jane Norton. Tell her no more tax hikes and big government spending.

vi. Earmarks²¹

Reckless spending, earmarks, debt, bankrupting our country. Politicians and insiders are at the trough. Take Billy Long, who says he's against earmarks. But while on the airport board of directors, he voted to use more than \$3 million in Congressional earmarks for a brand new bus terminal — a terminal that now sits empty. The Billy Long bus terminal to nowhere. Call Billy Long and tell him you're sick of earmarks and bus terminals to nowhere.

vii. Talk is Cheap²²

Liberal politicians will say anything, but talk is cheap. Take Jane Norton. [Norton clip] "The federal government is overspending, it's overtaxing, it's overregulating...." Wait, what's the real Norton record? Norton pushed the

¹⁹ AJS spent \$143,300, \$171,700, and \$126,496 on this advertisement.
<http://images.nictusa.com/pdf/544/10930858544/10930858544.pdf>;
<http://images.nictusa.com/pdf/356/10930863356/10930863356.pdf>;
<http://images.nictusa.com/pdf/654/10930869654/10930869654.pdf>.

²⁰ AJS spent \$318,874 and \$175,956 on this advertisement.
<http://images.nictusa.com/pdf/615/10930941615/10930941615.pdf>;
<http://images.nictusa.com/pdf/213/10991002213/10991002213.pdf>.

²¹ AJS spent \$45,100 on this advertisement.
<http://images.nictusa.com/pdf/407/10931073407/10931073407.pdf>.

²² AJS spent \$42,000 and \$585,800 on this advertisement.
<http://images.nictusa.com/pdf/422/10931073422/10931073422.pdf>;
<http://images.nictusa.com/pdf/321/10931075321/10931075321.pdf>.

largest tax hike in Colorado history. As a regulator, she managed a multimillion dollar surge in government spending. Yep, talk is cheap, but Jane Norton's real record has cost us plenty. Tell Jane Norton: no more high taxes and spending.

viii. Pennsylvania Jobs²³

Washington politicians are on a spending spree. Bigger government. Earmarks. Bailouts and debt have pushed our country to the brink. Pennsylvania needs relief. Barack Obama and Washington politicians don't get it. They want higher taxes and bigger government. Pat Toomey has a commonsense plan to get Pennsylvania back to work. Cut the red tape, so Pennsylvania small businesses are free to create jobs. Cut the spending. No more earmarks and no more bailouts. Toomey wants to end deficit spending — and return money to families and job creators. The Toomey plan: getting Pennsylvania working again. As a small businessman Toomey created jobs and knows what it takes to make a payroll. Pat Toomey: fiscal discipline, lower taxes, and common sense economic policies. Call Pat Toomey at 434-809-7994 and tell him you support his common sense plan to get Pennsylvania back to work.

ix. Instrumental²⁴

The economy's in a tailspin. Unemployment on the rise. And they just continue the spending, taxing, and bailouts. Harry Teague was instrumental in passing a job-killing cap-and-trade bill. Teague's tax would mean higher electric rates for families, higher gas prices, and cost us up to 12,000 jobs in New Mexico. Tell Harry Teague to stop his reckless spending, bailouts, and job-killing taxes.

x. Ants²⁵

Have you heard about how Joe Manchin supported the Obama stimulus, then wasted money on turtle tunnels, ant research and cocaine for monkeys? But that's not their only waste. Their stimulus wasted money on studying the atmosphere of Neptune, hunting for dinosaur eggs in China, and even the International Accordion Festival. We asked for jobs. What we got was waste. Really. Tell Obama and Manchin not to stimulate us anymore.

²³ The transcript for this advertisement is attached to the AJS Response as "Complaint Communication #33." AJS spent \$72,100 on this advertisement: <http://images.nictusa.com/pdf/553/10991128553/10991128553.pdf>.

²⁴ AJS spent \$54,572 on this advertisement. <http://images.nictusa.com/pdf/366/10030421366/10030421366.pdf>.

²⁵ AJS spent \$980,256 on this advertisement. <http://images.nictusa.com/pdf/957/10931695957/10931695957.pdf>.

1 AJS argues in its response that none of the above communications can be classified as
2 express advocacy under either 11 C.F.R. §§ 100.22(a) or 100.22(b), or as the functional
3 equivalent of express advocacy under *Wisconsin Right to Life, Inc. v. FEC*, 551 U.S. 449 (2007),
4 and therefore none of them constitutes federal campaign activity. Resp. at 2. As discussed
5 above, however, that argument fails to come to terms with the Commission's longstanding view
6 — upheld by the courts — that the required major purpose test is not limited solely to express
7 advocacy (or the functional equivalent of express advocacy). Each of the AJS ads features a
8 clearly identified federal candidate, supports or opposes a candidate, and was run in the
9 candidate's respective state shortly before a primary or election. The fact that the ads do not
10 contain express advocacy, or the functional equivalent, does not shield such ads from
11 consideration under the major purpose test.²⁶

12 Nor does *Buckley* support an argument that determining an organization's major purpose
13 is limited to consideration of its express advocacy. The Court first established the major purpose
14 test in the context of its discussion of Section 434(e) — a provision that required the disclosure
15 of expenditures by persons *other* than political committees. In order to cure vagueness concerns
16 in that section, the Court construed "expenditure" to reach only express advocacy. *Id.* at 79-80.
17 By contrast, limiting which expenditures *political committees* would have to disclose, the Court
18 held that the term "political committee" — as defined in Section 431(d) — "need only
19 encompass organizations that are under the control of a candidate or the major purpose of which
20 is the nomination or election of a candidate." *Id.* at 79. Thus, the two limitations were imposed
21 on two different terms in two different sections of the Act: (1) "express advocacy" as a

²⁶ Similarly, the fact that some of the ads contain a tag line requesting that the viewer call the candidate and tell the candidate to take certain action (e.g., "Tell Harry Teague to stop his reckless spending, bailouts, and job-killing taxes.") does not immunize the communications from being considered federal campaign activity when determining major purpose.

1 limitation on “expenditures” made by persons other than political committees pursuant to Section
2 434(e); and (2) “major purpose” as a limitation on the definition of “political committee”
3 pursuant to Section 431(d). The opinion could have articulated a test that linked the limitations
4 — requiring, for example, that to be considered a political committee an organization’s “major
5 purpose must be to *expressly advocate* the nomination or election of a candidate.” But the Court
6 did not take that tack. Indeed, the Court noted that even “*partisan committees*,” which include
7 “groups within the control of the candidate or *primarily organized for political activities*” would
8 fall outside the definition of “political committee” *only* if they fail to meet the statutory spending
9 threshold. *Id.* at 80 (emphasis added).

10 Similarly, in *MCFL*, the Court’s opinion nowhere suggests that express advocacy
11 communications are the only kind of “campaign activity” that can satisfy the major purpose test.
12 See *MCFL*, 479 U.S. at 252-53, 262 (political committee requirements inapplicable to
13 “organizations whose major purpose is not *campaign advocacy*,” but “political committee” does
14 include organizations with a major purpose of “*campaign activity*”) (emphasis added). And
15 many lower federal courts have likewise decided that a determination of major purpose is not
16 restricted to consideration of a group’s express advocacy as compared to its other activities.²⁷

²⁷ See *North Carolina Right to Life v. Leake*, 525 F.3d 274, 289 (4th Cir. 2008) (major purpose test may be implemented by examining, *inter alia*, “if the organization spends the majority of its money on *supporting* or *opposing* candidates”) (emphasis added); *Akins v. FEC*, 101 F.3d 731, 742 (D.C. Cir. 1997) (“an organization devoted almost entirely to *campaign spending* could not plead that the administrative burdens associated with such spending were unconstitutional as applied to it”) (emphasis added), *vacated on other grounds*, 524 U.S. 11 (1998); *FEC v. Machinists Non-Partisan Political League*, 655 F.2d 380, 393 (D.C. Cir. 1981) (recognizing “the grave constitutional difficulties inherent in construing the term ‘political committee’ to include groups whose activities are not . . . directly related to *promoting* or *defeating* a clearly identified ‘candidate’ for federal office”) (emphasis added); *RTAA*, 796 F. Supp. 2d 736, 751 (E.D. Va. 2011) (recognizing that “the FEC considers whether the group spends money extensively on campaign activities such as canvassing or phone banks, or on express advocacy communications” and “the FEC is entitled to consider the full range of an organization’s activities in deciding whether it is a political committee”), *affirmed by* 681 F.3d 544 (4th Cir. June 12, 2012); Transcript of Telephonic Oral Ruling, *Free Speech v. FEC*, No. 12-CV-127-SWS, at 21-22 (D. Wy. Oct. 3, 2012) (quoting *RTAA* and upholding Commission’s case-by-case method of determining political committee status), *appeal docketed*, No. 12-8078 (10th Cir. Oct. 19, 2012). But see *New Mexico Youth Organized v. Herrera*, 611 F.3d 669, 678 (10th Cir. 2010) (interpreting *Buckley*’s major purpose test as establishing that regulation as a political committee is only

1 AJS argues that its 2010 independent expenditures represent "a very minor portion" of its
2 overall activities since its founding in 1997. Resp. at 2, 5. A calendar year, however, and not a
3 group's entire history, provides the firmest statutory footing for the Commission's major purpose
4 determination — and is consistent with FECA's plain language. The Act defines "political
5 committee" in terms of expenditures made or contributions received "*during a calendar year.*"
6 2 U.S.C. § 431(4) (emphasis added). Moreover, in determining the major purpose of
7 organizations with longer histories, the Commission typically only considers the group's
8 election-year spending.²⁸ Thus, whether AJS had the requisite major purpose should be
9 determined by reference to its activities during the 2010 calendar year.

10 * * * *

11 AJS appears to have spent at least \$9,507,365 during 2010 on the type of
12 communications that the Commission has considered to be federal campaign activity — and
13 therefore indicative of major purpose — in past enforcement decisions. AJS's tax return shows
14 that it spent \$12,417,809 between November 1, 2009, and October 31, 2010. *See* Form 990,
15 Return of Organization Exempt from Income Tax (2009) at 1. The tax return does not allow us

constitutionally permissible (1) when an organization's central purpose is "campaign or election related"; or (2) when a "preponderance of [the organization's] expenditures is for express advocacy or contributions to candidates."); Statement of Reasons, Comm'rs. Petersen and Hunter at 6, MUR 5842 (Economic Freedom Fund) (interpreting the Court's major purpose requirement to mean that "the Act does not reach those 'engaged purely in issue discussion,' but instead can only reach . . . 'communications that expressly advocate the election or defeat of a clearly identified candidate'") (citing *Buckley*, 424 U.S. at 79-80); *see also Colo. Right to Life Comm., Inc. v. Coffman*, 498 F.3d 1137, 1154 (10th Cir. 2007) (holding a Colorado statute unconstitutional as applied because it "would, as a matter of common sense, operate to encompass a variety of entities based on an expenditure that is insubstantial in relation to their overall budgets").

²⁸ See MUR 5492 (Freedom, Inc.) (analyzing group's admitted major purpose in 2004 even though group was formed in 1962); MURs 5577 and 5620 (National Association of Realtors – 527 Fund) (analyzing NAR-527 Fund's 2004 spending even though group had registered with IRS since 2000); MUR 5755 (New Democrat Network) (analyzing New Democrat Network's 2004 spending while group had existed since at least 1996); MUR 5753 (League of Conservation Voters) (analyzing LCV's 2004 spending even though one of LCV's funds had registered with the IRS as early as 2000). *But see* MURs 5694 and 5910 (Americans for Job Security) (analyzing activity from 2000 through 2006 in determining group's major purpose in 2006).

1 to pinpoint in which calendar year the remaining approximately \$2.9 million in unreported
2 spending occurred. But even if we assume that all of its unreported spending was both unrelated
3 to federal campaigns and occurred in calendar year 2010 — the assumption most favorable to
4 AJS based on the available information²⁹ — the minimum amount spent on federal campaign
5 activity (\$9,507,365) is approximately 76.5% of AJS's total spending for calendar year 2010.
6 As a result, AJS's spending shows that the group's major purpose during 2010 was federal
7 campaign activity (i.e., the nomination or election of a federal candidate).³⁰

8 c. Conclusion

9
10 AJS made over \$1,000 in expenditures during 2010, and its spending during that calendar
11 year indicates that it had as its major purpose federal campaign activity (i.e., the nomination or
12 election of federal candidates). Accordingly, we recommend that the Commission find reason to
13 believe that AJS violated 2 U.S.C. §§ 432, 433, and 434, by failing to organize, register, and
14 report as a political committee, and that the Commission authorize an investigation. Although
15 we believe there is sufficient information at this stage to recommend pre-probable cause
16 conciliation based solely on AJS's spending for advertisements, as detailed herein, an
17 investigation of AJS's additional 2010 activity, including examination of its fundraising
18 solicitations and advocacy mailings, may furnish evidence of additional spending on federal
19 campaign activity that will enhance the public record and establish definitively the date by which
20 AJS should have registered as a political committee.

²⁹ Information about AJS's spending during November and December 2010 is not available.

³⁰ In reaching this conclusion, we do not intend to express the view that a finding of major purpose requires clearance of a 50% threshold, but only that the spending on federal campaign activity in this case is alone sufficient to support a finding of major purpose.

III. PROPOSED DISCOVERY


We plan to seek information (1) to establish the extent, nature, and cost of AJS's federal campaign activity and (2) to identify potential witnesses who may have relevant knowledge of these facts. We also request that the Commission authorize the use of compulsory process, including the issuance of appropriate interrogatories, document subpoenas, and deposition subpoenas, as necessary. The information sought through any discovery would be focused on ascertaining the scope of AJS's reporting obligations, and would be consistent with the type of information that the Commission seeks in its analysis of a group's requirements as a political committee.

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IV. RECOMMENDATIONS

1. Find reason to believe that Americans for Job Security violated 2 U.S.C. §§ 432, 433, and 434.
2. Approve the attached Factual and Legal Analysis.
3. Authorize the use of compulsory process in this matter.
4. Approve the appropriate letter.

5/2/13
Date


Anthony Herman
General Counsel


Daniel A. Petalas
Associate General Counsel for Enforcement


Peter Reynolds
Attorney